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**Dakota Premium Foods and United Food And Commercial Workers Union, Local 789.** Case 18–CA–16215–1

**DECISION AND ORDER**

April 1, 2002

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

This is a refusal-to-bargain case in which the Respondent seeks to contest the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 31, 2001, the General Counsel issued the complaint on November 9, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification in Case 18–RC–16679. (Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On December 12, 2001, the General Counsel filed a Motion for Summary Judgment. On December 12, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.<sup>1</sup> The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate*

<sup>1</sup> On December 12, 2001, the Respondent filed a motion to strike, or in the alternative, to allow it to file a brief in response to, the General Counsel’s Motion for Summary Judgment. The General Counsel filed an opposition. We deny the Respondent’s motion to strike. The Notice to Show Cause, issued on December 12, 2001, gave the Respondent an opportunity to respond to the General Counsel’s Motion for Summary Judgment.

*Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a Minnesota corporation with an office and place of business in South St. Paul, Minnesota, has been engaged in the operation of a packing house and meat processing business.

During the calendar year ending December 31, 2000, the Respondent, in conducting its business operations, sold and shipped from its South St. Paul, Minnesota facility goods valued in excess of \$50,000 directly to points outside the State of Minnesota, and purchased and received at its South St. Paul, Minnesota facility goods valued in excess of \$50,000 directly from points outside the State of Minnesota.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the election held July 21, 2000, the Union was certified on August 27, 2001,<sup>3</sup> as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including line leads, employed at its 425 South Concord Street, South St. Paul, Minnesota facility, and shipping employees at its Newport facility; excluding office clerical employees, professional and managerial employees, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

<sup>2</sup> Chairman Hurtgen dissented in the underlying representation case. Contrary to his colleagues in the majority, he would have found merit in the Respondent’s objection concerning the marked sample ballots, and therefore would have set aside the election and ordered a new election. Chairman Hurtgen, however, agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). In light of this, and for institutional reasons, he agrees with the decision to grant the General Counsel’s motion for summary judgment. Member Bartlett did not participate in the representation proceeding, but he also agrees that the Respondent has not raised any new matters that are properly litigable in the instant proceeding.

<sup>3</sup> On September 10, 2001, the Respondent filed a motion for reconsideration of the Board’s Decision and Certification of Representative. The Board denied the motion for reconsideration by unpublished Order dated December 13, 2001.

### B. Refusal to Bargain

On September 4, 2001, the Union, by letter, requested the Respondent to recognize and bargain and, since September 7, 2001, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSION OF LAW

By refusing, on and after September 7, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

### ORDER

The National Labor Relations Board orders that the Respondent, Dakota Premium Foods, South St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Refusing to recognize and bargain with United Food and Commercial Workers Union, Local 789, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, including line leads, employed at its 425 South Concord Street, South St. Paul, Minnesota facility, and shipping employees at its New-

port facility; excluding office clerical employees, professional and managerial employees, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in South St. Paul, Minnesota, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 1, 2002

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Peter J. Hurtgen, Chairman

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Wilma B. Liebman, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

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<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with United Food and Commercial Workers Union, Local 789, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees, including line leads, employed at our 425 South Concord Street, South St. Paul, Minnesota facility, and shipping employees at our Newport facility; excluding office clerical employees, professional and managerial employees, and guards and supervisors as defined in the Act.

DAKOTA PREMIUM FOODS